

THE HONORABLE JAMES L. ROBART

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION**

CYWEE GROUP LTD.,

Plaintiff,

HTC CORPORATION
and
HTC AMERICA, INC.,

Defendants.

CASE NO. 2:17-cv-00932-JLR

JURY TRIAL DEMANDED

**MOTION TO PRECLUDE
CONSIDERATION OF BELATED
CLAIMS CONSTRUCTION POSITIONS**

**NOTE ON MOTION CALENDAR:
MAY 4, 2018**

1 In their initial invalidity contentions, Defendants (collectively “HTC”) alleged that only a
 2 single term was indefinite. More than *two months* later, HTC alleged that three additional claim
 3 terms are also indefinite. HTC made these allegations *less than a month* before the parties’ Joint
 4 Claim Chart and Prehearing Statement deadline. HTC never sought leave to amend its invalidity
 5 contentions. Rather, HTC unilaterally alleged that three additional terms were indefinite in its
 6 Disclosure of Preliminary Claim Constructions and Evidence (the “Disclosure”). CyWee’s
 7 expert witness report on claim construction, which CyWee timely served more than a month and
 8 a half ago, did not address the indefiniteness of any terms beyond the sole term that HTC
 9 identified in its invalidity contentions. Hence, HTC’s belated and unwarranted assertion that
 10 three additional terms are indefinite substantially prejudices CyWee by preventing its expert
 11 from rendering an opinion applicable to this case. The Court should refuse to consider such late
 12 assertions in claims construction.

13 I. FACTUAL BACKGROUND

14 On December 14, 2017, this Court issued its minute order setting trial and related dates. Dkt.
 15 42. The order commands the parties to comply with the Court’s Standing Order (“Standing
 16 Order”). *Id.* at 2. The Standing Order, in turn, requires HTC to include “any grounds for
 17 invalidity based on indefiniteness, enablement, or written description under 35 U.S.C. §112” in
 18 its preliminary invalidity contentions. Standing Order at 2-3.

19 On January 19, 2018, HTC served its invalidity contentions, an excerpt of which is attached
 20 hereto as Exhibit A. In its invalidity contentions, HTC identified only the term “the spatial
 21 reference frame” as indefinite. Based in part on those contentions, and pursuant to the Court’s
 22 scheduling order, on February 16, 2018, CyWee served its expert report regarding *Markman*
 23 issues, addressing indefiniteness only as to the term “the spatial reference frame.” Dkt. 42 at 1.
 24 Thereafter, HTC served its initial proposed claim terms on February 20, 2018 and its Disclosure,
 25 attached hereto as Exhibit B, on March 30, 2018.

1 In its Disclosure, HTC alleged for the first time that the following three claim terms were
2 indefinite:

- 3 • utilizing a comparison to compare the first signal set with the second signal set;
- 4 • comparing the second quaternion in relation to the measured angular velocities ω_x , ω_y ,
5 ω_z of the current state at current time T with the measured axial accelerations A_x , A_y , A_z
6 and the predicted axial accelerations A_x' , A_y' , A_z' also at current time T; and
- 7 • generating the orientation output based on the first signal set, the second signal set and
8 the rotation output or based on the first signal set and the second signal set.

9 See Ex. B at 4. HTC had not alleged that any of these terms were indefinite in its invalidity
10 contentions. See Ex. A. CyWee immediately objected to HTC's belated allegations of
11 indefiniteness. The parties met and conferred on April 5, 2018; however, HTC refused to drop
12 the additional claim terms referenced above, nor did it seek leave of Court to add them.¹

13 II. ARGUMENT

14 Rather than trying to narrow the issues in preparation for the Joint Claim Chart and
15 Prehearing Statement, HTC now insists on expanding them and muddling the claim construction
16 process. CyWee will be severely prejudiced by HTC's belated allegations of indefiniteness. See
17 *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989) (A party shows prejudice when it has been
18 "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it
19 would have offered had the . . . amendments been timely."). Had HTC complied with the
20 Standing Order and timely identified all its assertions of indefiniteness, CyWee would have
21 included the three additional claim terms in its expert report. Because HTC's belated allegations
22
23

24 ¹ HTC later agreed to drop its allegations of indefiniteness for a fourth term, which it identified
25 as a term to be construed for the first time in its Disclosure.

1 of indefiniteness have deprived CyWee of the opportunity to address the three terms in its expert
 2 report, these additional claim terms should not be considered in claims construction. *See id.*

3 Such prejudice to CyWee cannot be ameliorated by delaying claim construction to allow
 4 CyWee to supplement its expert report, because delaying claim construction would still prejudice
 5 CyWee. In patent cases, claim construction is the most critical pre-trial event. *See e.g.*
 6 *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011)
 7 (Moore, J., dissenting) (joined by Rader, J.) (“Claim construction is the single most important
 8 event in the course of a patent litigation. It defines the scope of the property right being enforced
 9 and is often the difference between infringement and non-infringement, or validity and
 10 invalidity.”) Therefore, once a claim construction order issues, the case is more likely to settle
 11 because the parties would be able to evaluate their positions based on how the claims are
 12 construed. Here, any delay only compounds the harm CyWee suffers since CyWee’s patents are
 13 being infringed. Rather, the appropriate remedy to the prejudice caused by HTC’s belated
 14 indefiniteness assertions is for the Court to simply exclude those assertions from consideration.²

15 Furthermore, the Northern District of California has held that “[a]ny invalidity theories not
 16 disclosed pursuant to Local Rule 3–3 are barred, accordingly, from presentation at trial (whether
 17 through expert opinion testimony or *otherwise*).” *See Karl Storz Endoscopy-Am., Inc. v. Stryker*
 18 *Corp.*, No. 14-CV-00876-RS(JSC), 2017 WL 5257001, at *4 (N.D. Cal. Nov. 13, 2017) (citing
 19 *MediaTek Inc. v. Freescale Semiconductor, Inc.*, No. 11-CV-5341-YGR, 2014 WL 690161, at *1
 20 (N.D. Cal. Feb. 21, 2014) (emphasis added). In *Karl Storz Endoscopy-Am., Inc.*, the defendant’s
 21 35 § 101 theories, not disclosed in its Invalidity Contentions, were stricken. *Id.* This District’s
 22

23 ² CyWee’s prejudice cannot be mitigated, solely, through the use of extrinsic evidence from a
 24 different case, in a different district, and used in a different context. HTC cannot obstruct
 25 CyWee’s ability to defend against all theories of invalidity in *this case* simply by asserting new
 26 allegations of indefiniteness in the eleventh hour.

1 Local Patent Rules are very similar to those of the Northern District of California. In fact, this
2 Court has used those rules to interpret this District's rules on various occasions. *See e.g. Pac.*
3 *Bioscience Labs., Inc. v. Nutra Luxe MD, LLC*, No. C10-0230JLR, 2012 WL 12845608, at *2
4 (W.D. Wash. July 9, 2012) (using the Northern District of California rules to evaluate Local
5 Patent Rule 124). Consequently, this Court should bar HTC from attempting to use new theories
6 it has failed to include in its Invalidity Contentions.

7 HTC's untimely indefiniteness assertions cannot be excused by amending its invalidity
8 contentions. Local Patent Rule 124 allows for amendments of infringement contentions "only by
9 order of the Court upon a timely showing of good cause." L.P.R. 124. Setting aside *arguendo* the
10 fact that it has not sought leave of Court to amend its invalidity contentions, HTC cannot show
11 the necessary good cause for amendment. This District's Local Patent Rules require the parties to
12 provide early notice of their infringement contentions, and to proceed with diligence in amending
13 those contentions. *REC Software USA, Inc. v. Bamboo Solutions Corp.*, No. C11-0554JLR, 2012
14 WL 3527891, at *2 (W.D. Wash. Aug. 15, 2012) (quoting *O2 Micro Int'l Ltd. v. Monolithic*
15 *Power Sys., Inc.*, 467 F.3d 1355, 1365-66 (Fed. Cir. 2006)). "In contrast to the more liberal
16 policy for amending pleadings, 'the philosophy behind amending claim charts is decidedly
17 conservative and ***designed to prevent the 'shifting sands' approach to claim construction.***'" *Id.*
18 (emphasis added) (quoting *LG Elecs., Inc. v. Q-Lily Computer, Inc.*, 211 F.R.D. 360, 367
19 (N.D.Cal. 2002)). In determining whether there is good cause for amendment, this District
20 follows a two-part test: (1) examining the diligence of the moving party; and (2) upon a finding
21 of diligence, examining the prejudice to the non-moving party. *Id.* at *2-3.

22 Here, HTC has not acted diligently, and an amendment would result in undue prejudice to
23 CyWee. When HTC served its invalidity contention ***more than two months ago***, there was
24 nothing preventing HTC from asserting that the additional terms identified in the Disclosure are
25 indefinite. HTC has made no effort to explain why it failed to allege the three claim terms as
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indefinite in the first place and did not timely seek to amend its contentions. HTC's present attempt to add new indefiniteness assertions, *less than a month* before the parties' Joint Claim Chart and Prehearing Statement and well after CyWee served its expert report, is precisely the kind of "shifting sand" approach to claim construction that the Local Patent Rules are designed to prevent. *See id.* at 2. The Local Patent Rules require parties "to crystallize their theories of the case early in the litigation and to *adhere to those theories once they have been disclosed.*" *O2 Micro Int'l Ltd.*, 467 F.3d at 1366 n.12 (emphasis added). This Court is not "forgiving of a party's failure to move to amend its contentions to include a significant prior art reference or new infringement or invalidity theory," and HTC's conduct in this case presents no exception. *REC Software USA, Inc.*, 2012 WL 3527891, at *5.

III. CONCLUSION

HTC's failure or refusal to abide by the Standing Order and timely disclose all its assertions of indefiniteness threatens to cause substantial prejudice to CyWee by (1) preventing CyWee from presenting expert opinions on such assertions; and/or (2) unnecessarily delaying the claims construction proceeding. To avoid such prejudice to CyWee, this Court should preclude HTC's belated allegations of indefiniteness and the associated three claim terms from consideration.

Dated this 13th day of April, 2018.

Respectfully submitted,

/s/Carmen E. Bremer

Carmen E. Bremer, WSBA 47,565
carmen.bremer@bremerlawgroup.com
BREMER LAW GROUP PLLC
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
T: (206) 357-8442
F: (206) 858-9730

1 Michael W. Shore* (mshore@shorechan.com)
2 Alfonso G. Chan* (achan@shorechan.com)
3 Christopher Evans* (cevans@shorechan.com)
4 Ari B. Rafilson* (arafilson@shorechan.com)
5 William D. Ellerman (wellerman@shorechan.com)
6 Paul T. Beeler* (pbeeler@shorechan.com)
7 SHORE CHAN DEPUMPO LLP
8 901 Main Street, Suite 3300
9 Dallas, Texas 75202
10 T: (214) 593-9110
11 F: (214) 593-9111

12 * Admitted pro hac vice

13 *Attorneys for Plaintiff CyWee Group Ltd.*

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I presented this MOTION TO PRECLUDE to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: April 13, 2018

/s/ Carmen E. Bremer

Carmen E. Bremer